TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 163.

SOLOMON BROWN, PLAINTIFF IN ERROR,

vs.

THEODORE B. SMART, JOSEPH H. PATTERSON, AND WILMOT L. RICE, COPARTNERS, TRADING AS SMART, PATTERSON & RICE.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

FILED OCTOBER 8, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 8, 1891.

1 STATE OF MARYLAND, *sct:*

At a court of appeals of the State of Maryland begun and held for the said State, at the city of Annapolis, on the first Monday of April, it being the second day of said month, in A. D. one thousand eight hundred and eighty-eight, and of the Independence of the United States of America the one hundred and twelfth—present, the Honorable Richard H. Alvey, chief judge, and associate judges seven, Levin T. H. Irving, John M. Robinson, George Yellott, Oliver Miller, James McSherry, Frederick Stone, Wm. Shepard Bryan—among other were the following proceedings, to wit:

2 In the Court of Common Pleas. In Insolvency.

THEODORE B. SMART, JOSEPH H. PATTERSON, and Wilmot L. Rice, Copartners, Trading as Smart, Patterson & Rice, Plaintiffs, *vs.* SOLOMON BROWN, Defendant.	IN the Court of Common Pleas. In Insolvency.

Action in involuntary insolvency instituted December 9th, 1887; writ of summons issued, returnable December 20th, 1887.

Petition. Filed December 8th, 1888.

In the Court of Common Pleas of Baltimore City.

In the Estate of SOLOMON BROWN.

To the Honorable George William Brown, chief judge of the supreme bench of Baltimore city, assigned in part to the court of common pleas:

The petition of Theodore B. Smart, Joseph H. Patterson, and Wilmot B. Rice, copartners, trading as Smart, Patterson & Rice, respectfully shows—

That one Solomon Brown, of the city of Baltimore, has been, and at the time of the execution and delivery of the deed of trust hereinafter mentioned was, a merchant and trader doing business within the jurisdiction of this honorable court.

2nd. That your petitioners are merchants and traders, doing business in the State and city of New York; have sold goods to said Solomon Brown on a credit, which credit has expired; and they allege that the said Solomon Brown is indebted to them in a sum more than two hundred and fifty dollars, to wit, in the sum of $608.59; that they have made demand for the payment of the same and their demand has been by said Solomon Brown refused.

3rd. That on or about November 30th, 1887, and while so indebted to your petitioners, and being insolvent or in contemplation of insolvency, the said Brown executed, acknowledged, and delivered to one Isaac Eichberg, of Alexandria, Virginia, a deed of trust of all his property for the pretended benefit of all his creditors, but in reality for the benefit of certain of his alleged creditors, whose

names and the amounts of whose alleged claims are shown by said deed and are as follows: Alexander Fries & Bro., $4,500.00; Charles Fries, $4,000.00; William Fries, $3,600.00, and Morris Frank, $500.00.

4th. That a certified copy of said deed, filed herewith as part hereof, shows that the said Brown, being a merchant and trader, and being indebted to an amount larger than two hundred
3 and fifty dollars, did endeavor to create many fraudulent and void preferences in direct contravention of the provisions of article 48 of the Code of Public General Laws of the State and the several amendments thereto.

5th. Your petitioners pray that a subpœna may issue for each of the following persons, to answer the premises upon some day to be named in said subpœna; that said Solomon Brown may be adjudicated to an insolvent debtor and a trustee appointed to take care of, manage, and distribute his estate under the supervision and control of this court; that the pretended deed from said Brown to said Isaac Eichberg, trustee, may be decreed to be fraudulent, void, and of no effect, and that said Brown and said Isaac Eichberg, trustee aforesaid, be restrained and enjoined from interfering with the property of said Brown until the final adjudication in this cause, and that your petitioners may have all and every other relief their case may require against said Brown and Eichberg and the others above named, to wit, Alexander Fries, of Cincinnati, Ohio; Gustav Fries, Cincinnati, Ohio; Charles Fries and Morris Frank, of New York, and William Fries, of San Francisco, California.

And as in duty, &c.

SMART, PATTERSON & RICE,
Per JOSEPH H. PATTERSON.

CHAS. POE,
Sol'r for Petitioners.

And on the same day, to wit, the eighth day of December, A. D. 1887, the following exhibit accompany- the foregoing petition was also filed, to wit:

Solomon Brown, deed to Isaac Eichberg.

This deed, made this thirtieth day of November, eighteen hundred and eighty-seven, by Solomon Brown, of Baltimore city and State of Maryland, of the first part, and Isaac Eichberg, of the city of Alexandria and State of Virginia, of the second part, witnesseth:

That the said Solomon Brown being indebted to sundry persons to an amount exceeding his present means to pay his said creditors in full, and being desirous to apply all his property and estate of every kind to the payment of his debts in the manner hereinafter provided as far as his said estate will suffice to pay the same:

Now, therefore, in consideration of the premises and of one dollar to him paid by the party hereto of the second part, the said Solomon Brown doth give, bargain, and sell, assign, and convey unto the said

Isaac Eichberg all the estate and property of every kind, oral, personal, and mixed, and wherever situate, of him, the said Solomon Brown, or to which he is or may be in — way entitled, including all the stock of goods, wares, and merchandize of him, the said Brown, now being in the store occupied by him and known by its present number nineteen (No. 19) West Baltimore street, in the city of Baltimore, and all debts, accounts, and choses in action of every kind due or to become due to said Brown:

To have and to hold all real estate hereby conveyed unto the said Isaac Eichberg, his heirs and assigns, in fee simple, and all personal estate to him, his executors or administrators and assigns, as
4 fully to all intents and purposes as said Brown is lawfully entitled to convey his said estate and property of all kinds; in trust, however, for the following purposes, that is to say: In trust to take possession *for think* of everything hereby conveyed belonging to said Brown before the execution of these presents as herein conveyed and to reduce the same to money by all appropriate and lawful means as soon as may be, to which end full power and authority is hereby granted to said trustee to sell any and all property hereby co-veyed, vendible in its nature, in the manner most advantageous to the interests of the creditors of said Brown, and authorized by law, as soon as may be, and to collect all debts and choses in action hereby conveyed and in trust, after pay- all necessary and proper charges and expenses attending the reduction of said estate to money by all appropriate and legal means, including such commission to said trustee as may be allowed him for his services by the circuit court of Baltimore city or any other court of equity in which he may lawfully administer the trusts hereby declared, to apply the net residue of said estate to the payment equally and without priority to the following persons of the several sums hereinafter mentioned, that is to say: To Alexander Fries, of Cincinnati, in the State of Ohio, Gustav Fries, of the same place, and Charles Fries, of the city and State of New York, copartners under the name of Alexander Fries and Brother, doing business in the city of New York, two certain promissory notes made by said Brown, passed by said Brown to said Alexander Fries and Brothers, borrowed by him from said firm in New York city, one of said notes bearing date July 16th, 1887, payable four months after date, for the sum of twenty-two hundred and fifty ($2,250) dollars, and the other for a like sum, dated June 9th, 1887, payable six months after date; and to the said Charles Fries, of the city of New York, two promissory notes of the said Brown, one dated September 16th, 1887, for the sum of two thousand five hundred dollars ($2,500), payable six months after date, and the other dated September 30th, 1887, for one thousand five hundred dollars ($1,500), payable on demand; and to William Fries, of San Francisco, Cal., a note of said Brown, dated December 29th, 1886, for two thousand dollars ($2,000), payable one year after date, and another note of said Brown, dated March 14th, 1887, payable one year after date, for one thousand six hundred dollars ($1,600); and to Albert Fries, of the city and State of New York, a note of said Brown, dated December 29th, 1886, for one thousand dollars ($1,000),

payable one year after date; and to Morris Frank, of the city and State of New York, the sum of five hundred dollars ($500), due him for money loaned to said Brown; all of said obligations hereby secured and preferred being for money loaned to said Brown by the several creditors above named; the said creditors above named being hereby preferred by said Brown in consideration of their agreement to accept the provisions hereby made for the payment of their said several debts in full satisfaction of their claims against said Brown, and to acquit and discharge him from any part of said several debts hereby secured which remain unsatisfied by the proceeds of the property hereby conveyed in trust; and after the payment of each and all of said creditors above named of the several amounts above stated as due to them equally and without any priority between them, then in trust as to the residue of the net proceeds of the property and estate hereby conveyed to apply the same to the payment of all other creditors of the said Solomon Brown equally and without priority or preference among them, in full, if said net residue of the estate shall suffice to pay them in full, or *pro rata* if said net residue shall not be sufficient to pay said other creditors in full, and in trust after the payment of all of the creditors of said Solomon Brown and the discharge of all his liabilities to pay any residue that may remain to the said Brown.

In testimony whereof the said Solomon Brown has hereto set his hand and seal the day and year first above written.

SOLOMON BROWN. [SEAL.]

Witness:
S. MAGRUDER TUBMAN.

STATE OF MARYLAND, *Baltimore City*, } *To wit*:

Before the subscriber, a justice of the peace for the State of Maryland in and for Baltimore city, personally appeared this 30th day of November, 1887, the above-named Solomon Brown and acknowledged the foregoing deed of trust to be his act and deed; at the same time personally appeared Isaac Eichberg, the within-named trustee, and made oath in due form of law that the consideration of the foregoing deed is true and *bona fide* as therein set forth.

S. MAGRUDER TUBMAN, *J. P.*

Rec'd for record Nov. 30th, 1887, @ 3.10 o'cl'k; same day recorded and ex'd .

Per JAS. BOND, *Cl'k.*

I hereby certify that the foregoing is a true copy taken from Liber J. B. No. 1167, folio 4, &c., one of the land records of Baltimore city.

(Seal'- place.) In testimony whereof I have hereto set my hand and affixed the seal of the superior court of Baltimore city this 9th day of Dec., A. D. 1887.

JAS. BOND, *Cl'k.*

Demurrer. (*Filed December 20th*, 1887.)

THEODORE B. SMART, JOSEPH H. PATTERSON, and WILMOT B. RICE, Copartners, Trading as Smart, Patterson & Rice, *vs.* SOLOMON BROWN.	In the Court of Common Pleas of Baltimore City. In Insolvency.

The demurrer of Solomon Brown to the petition of Theodore B. Smart, Joseph H. Patterson, and Wilmot B. Rice, copartners, trading as Smart, Patterson & Rice, to have him, the said Solomon Brown, adjudicated an insolvent, shows—

That the several matters and things in the said petition alleged, as therein pleaded, are not sufficient in law to warrant an adjudication in insolvency against him, the said Solomon Brown, prayed.

And the said Solomon Brown prays the judgment of this honorable court whether he shall be required to make other or further answer to the said petition.

MARSHALL & HALL,
Att'ys for Solomon Brown.

6 *Order of Court.* (*Filed March 21st*, 1888.)

SMART, PATTERSON & RICE *vs.* SOLOMON BROWN.	In the Court of Common Pleas. In Insolvency.

The demurrer of Solomon Brown to the petition of Smart, Patterson & Rice having been submitted and argued by counsel, it is adjudged and ordered this 21st day of March, 1888, that said demurrer be, and the same is hereby, overruled, and that the said Brown answer said petition.

EDW'D DUFFY.

Answer of Solomon Brown (*Filed 21st March*, 1888.)

SMART, PATTERSON & RICE *vs.* SOLOMON BROWN.	In the Court of Common Pleas. In Insolvency.

To the honorable the judge of the court of common pleas of Baltimore city, sitting in insolvency:

The answer of Solomon Brown to the petition filed in this case respectfully shows:

First. That he admits that the petitioners are creditors of this respondent to the amount mentioned in the petition, and that this respondent was a merchant and trader as alleged. He also admits the execution by him of the deed mentioned in the petition, but he denies that the same contains any illegal or forbidden preference, for he alleges that the persons named as preferred creditors in said deed of trust all reside out of the State of Maryland, and were cred-

itors of this respondent upon contracts made and to be performed out of the State of Maryland, and that each and every one of said creditors named in said deed agreed with this respondent at the time of the execution of said deed to accept the provisions of said deed made for each of said creditors in full satisfaction of their respective claims against him, and did, in consideration of said deed and the provisions therein contained as to each of said creditors, release this respondent from all further obligation to each of said creditors, and elect to take the benefit of said deed in full discharge and satisfaction of said claims and each of them.

Second. This respondent denies that this court has any jurisdiction to decide upon the validity and effect of said deed of trust, and especially does he deny that such an adjudication can be made in any court which has not acquired jurisdiction over the persons named in said deed of trust, either directly or by representation through the trustee; and he avers that neither the trustee named in said deed nor any of the creditors secured thereby have been served with process or otherwise been made parties to this proceeding, even if it would in any case be competent for this court to exercise jurisdiction in said petition to declare the deed of trust void, which this respondent denies; and he respectfully claims the benefit of this answer to so much of the petition as prays that the
7 said deed may be declared void, as if the same had been formally taken by plea to the jurisdiction or by demurrer.

SOLOMON BROWN.

MARSHALL & HALL,
Att'ys for S. Brown.

STATE OF MARYLAND, *City of Baltimore,* } *sct:*

I hereby certify that on this nineteenth day of March, A. D. 1888, before the subscriber, a justice of the peace of the State of Maryland in and for Baltimore city, personally appeared Solomon Brown and made oath in due form of law that the matters and facts stated in the aforegoing answer are true to the best of his knowledge, information, and belief.

JOHN J. DUNN.

Order of Court. (*Filed 21st March*, 1888.)

SMART, PATTERSON & RICE *vs.* SOLOMON BROWN. } In the Court of Common Pleas. In Insolvency.

This case having been submitted upon the petition of Smart, Patterson & Rice, and the answer of Solomon Brown thereto, by their respective counsel; and having been by them argued, the several defences taken in the answer of said Brown, being the first and second defences taken therein, be, and the same are hereby, overruled; and it is thereupon, this 31st day of March, 1888, ordered that Solomon Brown be, and he is hereby, adjudicated an insolvent, and

that the deed from said Solomon Brown to Isaac Eichberg, trustee, mentioned in and filed with said petition and dated November 30th, 1887, be, and the same is hereby, declared to be void, and that Charles A. Boston be, and he is hereby, appointed preliminary trustee, and that before proceeding to act in the premises the said preliminary trustee shall file an approved bond in the penalty of $1,000.00

EDW'D DUFFY.

Order of Appeal. (*Filed* 21*st March*, 1888.)

SMART, PATTERSON & RICE *vs.* SOLOMON BROWN. } In the Court of Common Pleas. In Insolvency.

The respondent, Solomon Brown, prays an appeal to the court of appeals from the order overruling his demurrer to the petition and from the adjudication and order of the court passed this day declaring him an insolvent and declaring void the deed of trust executed by him to Isaac Eichberg, dated Nov. 30th, 1887.

CHARLES MARSHALL,
Att'y for Brown.

Appellant's costs ---------- $17 50
Appellee's " ---------- 12 15

8 STATE OF MARYLAND, *City of Baltimore,* } *sct:*

I, John T. Gray, clerk of the court of common pleas in ths eighth judicial circuit of the State of Maryland, do hereby certify that the aforegoing is truly taken from the record of proceedings of the court of common pleas, in insolvency, in the therein-entitled cause.

(Seal's Place.) In testimony whereof I have hereunto set my hand and affixed the seal of said court on this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN T. GRAY,
Clerk of the Court of Common Pleas.

9 Court of Appeals of Maryland, April Term, 1888.

SOLOMON BROWN *vs.* SMART, PATTERSON AND RICE. }

Opinion by ALVEY, *C. J.:*

This is an appeal by an insolvent debtor from an order of the court below adjudicating him an involuntary insolvent under the provisions of the insolvent law of this State as enacted by the act of the General Assembly of 1886, ch. 298 and incorporated into article 48 of the Code as part thereof. It is section 13 of the arti-

cle just mentioned that is material to the determination of this case. By that section it is provided that "No deed or conveyance executed or lien created by any banker, stockbroker, merchant, manufacturer, or trader being insolvent or in contemplation of insolvency shall be lawful or valid if the same shall contain any preferences save such as results from operation of law
10 and save those for the wages or salaries to clerks, servants, and employees contracted not more than three months anterior to the execution thereof, and all preferences, with the exceptions aforesaid, shall be void, however the same may be made; provided the grantor or party creating said lien or preference shall be proceeded against under section twenty-four or shall apply for the benefit of this act under section one within four months after the recording of the deed or conveyance or the creation of said lien or preference, and shall be declared or shall become under the provisions of this act an insolvent."

The petitioners, upon whose petition the debtor was adjudicated an insolvent, are conceded to be creditors of the insolvent and are citizens of the State of New York. It is also conceded that the insolvent was at the time of committing the act of insolvency charged a merchant trader doing business in the city of Baltimore. The petition makes all the necessary allegations of fact to bring the parties within the terms of the statute. The petition was filed
11 on the 8th of December, 1887, and it charges that the debtor, on the 30th of November, 1887, being then insolvent or in contemplation of insolvency, executed and delivered to a certain Isaac Eichberg, of the State of Virginia, a deed of trust of all his property of every kind and description for the pretended benefit of all his creditors; but, by reason of undue preferences given to certain creditors named in the deed, the assignment was in reality for their benefit only and not for the benefit of creditors generally. The petition charges that the preferences thus given are in violation of the insolvent law of the State and constituting an act of insolvency according to the express terms of the statute. The creditors whose claims are preferred by the deed are all non-residents of this State and are citizens of other States of the Union. The deed was made and recorded in this State, and the property intended to be transferred by it is situated here, consisting, principally, of a stock of goods and merchandize in store in the city of Baltimore, together with all
12 the debts, accounts, and choses in action of every kind belonging to the debtor. The deed of assignment is exhibited with the petition, and upon its face the fact is recited that the debtor was insolvent; that he was indebted to an amount that exceeded his means to pay his creditors in full, and he therefore made the assignment giving the preferences referred to in the petition.

The petition prayed for subpœnas against the debtor, the trustee, and the preferred creditors named in the deed of assignment, that they might answer; but none but the debtor was served, and he alone appeared and entered a demurrer to the petition. The demurrer was overruled, and he then answered. By his answer he admits that he was a merchant and the petitioners were his credit-

ors, as alleged. He also admits the making of the deed of assignment, but he denies that such deed contains any illegal or forbidden preferences; and he then proceeds to state the grounds of his defence to the petition thus:

1. "He alleges that the persons named as preferred cred-
13 itors in said deed of trust all reside out of the State of Maryland and were creditors of this respondent upon contracts made and to be performed out of the State of Maryland, and that each and every one of said creditors named in said deed agreed with this respondent at the time of the execution of said deed to accept the provisions of said deed made for each of said creditors in full satisfaction of their respective claims against him, and did, in consideration of said deed and the provisions therein contained as to each of said creditors, release this respondent from all further obligation to each of said creditors and elect to take the benefit of said deed in full discharge and satisfaction of said claims and each of them.

2. "He denies that this court has any jurisdiction to decide upon the validity and effect of said deed of trust, and especially does he deny that such an adjudication can be made in any court which has not acquired jurisdiction over the persons named in said deed of trust either directly or by representation through the trustee,
14 and he avers that neither the trustee named in said deed nor any of the creditors secured thereby have been served with process or otherwise been made parties to this proceeding, even if it would in any case be competent for this court to exercise jurisdiction on said petition to declare the deed of trust void, which this respondent denies; and he respectfully claims the benefit of this answer to so much of the petition as prays that the said deed may be declared void, as if the same objection had been formally taken by plea to the jurisdiction or by demurrer."

Upon hearing, the court passed the order of the 21st of March, 1888, adjudicating and declaring the debtor to be an insolvent and declaring the deed of assignment void, in accordance with the prayer of the petition. It is from this order that the present appeal is taken by the insolvent debtor.

It is quite apparent from this statement of the case and the defence interposed by the insolvent that the important question involved is as to the extent to which State insolvent laws can be made effectual to secure the full administration of the assets
15 of insolvent debtors within the jurisdiction of the several States.

It would be a very unnecessary work for this court at this day to restate the reasons and arguments employed by the Supreme Court of the United States in the many cases that have been decided by that tribunal wherein it has been held that the legislatures of the several States of the Union have authority to pass bankrupt or insolvent laws. It has been so held by that high tribunal uniformly and in a large number of cases, but subject to the proviso that there be no act of Congress in force establishing a uniform system of bankruptcy with which such State laws could con-

flict, and that such State insolvent laws be so framed that they do not in any way impair the obligation of contracts; and as a logical result of this power retained by the States it is held that such bankrupt or insolvent laws of the State which discharge both the person of the debtor and his future acquisitions of property do not impair the obligation of contracts so far as respects debts contracted
16 subsequent to the passage of such laws; but such State laws can have no extra-territorial effect so as to operate upon the rights or claims of non-residents of the State, and, therefore, the claims of citizens of another State will not be barred by a discharge under the State insolvent law, although the debt was made payable in the State where the discharge was had, and this without reference to the place where the contract was made. This is the result of the decisions of the Supreme Court from that made in the leading case of Sturges *vs.* Crowninshield, 4 Wheat., 122, to that of Baldwin *vs.* Hall, 1 Wall., 223. If, however, a creditor, being a citizen of another State, invokes the aid of the insolvent laws or voluntarily makes himself a party to the proceedings thereunder he thereby abandons his extra-territorial immunity, and he will be bound and his claim discharged as if he were a domestic creditor. Clay *vs.* Smith, 3 Tet., 411; Jones *vs.* Horsey, 4 Md., 306. And it is among the privileges and immunities secured to the citizens of each State by the Federal Constitution, art. 4, sec. 2, to institute and take the benefit of legal proceedings in the courts of any other State (Campbell *vs.* Morris, 3 H. & McH., 535; Corfield *vs.* Coryell, 4
17 Wash. C. C., 380; Morgan *vs.* Neville, 74 Penn. St., 52; Reynolds *vs.* Geary, 26 Conn., 183; Barrell *vs.* Benjamin, 15 Mass., 354), so that the New York creditors had full right to file the petition and to ask to have the debtor declared an insolvent for the act of insolvency set forth in their petition.

It is not and could not for a moment be contended that the adjudication of the debtor an insolvent under the State insolvent law could operate to discharge or impair the obligation of the original contracts of indebtedness from the insolvent debtor to the non-resident creditors. Such contracts are entirely exempt from the operation of the State insolvent laws, unless the creditors elect to become parties in some form to the insolvent proceeding; but it is insisted, on the part of the appellant, that the deed of assignment having been made and accepted on the basis of a contract for the release and satisfaction of pre-existing debts, it constitutes a contract with the preferred non-resident creditors, which is equally protected from the operation of the State insolvent law, as the original contracts creating such debts, and therefore the assignment itself cannot be affected or invalidated by the operation
18 of such insolvent law; but to that proposition, as presented under the facts of this case, we cannot assent. The questions are, whether the making of such deed of assignment constitutes an act of insolvency on the part of the debtor; and, if so, whether such assignment is subject to the operation of the insolvent law of the State. It requires no argument to show that if such proposition as that contended for could be maintained it would virtually defeat

the power of the States to enforce or give effect to their insolvent laws, for there are few merchants or traders such as those mentioned in the 13th section of the insolvent law of this State who have not creditors beyond the limits of the State and to whom or for whose benefit such assignments could be made without risk of impeachment; but such methods, we think, can never be sanctioned as a means to defeat to any extent a great and important power of internal government reserved to the States.

As will be observed, the statute makes no sort of reservation in favor of non-resident creditors to whom or for whose benefit assign-
19 ments may be made. On the contrary, it is emphatic in declaring that no deed or conveyance executed by the debtor, being of the class of debtors mentioned and being insolvent or in contemplation of insolvency, shall be lawful or valid if the same shall contain any preferences save such as are mentioned, and all preferences, with the exceptions named, shall be void, however the same may be made, if the debtor be proceeded against under or shall apply for the benefit of the statute within four months after the recording of the deed or the creation of the preference, and shall be declared or become an insolvent under the law. Here the proceedings were instituted within the time prescribed, and by section 23 of art. 48 it is expressly declared that the making of any such assignment with preferences shall be deemed an act of insolvency by the debtor.

There can be no question of the jurisdiction of the court over the insolvent debtor himself; and, the property being here and within the jurisdiction of the court and the assignment having been made here and dependent upon the law of this State for its validity, we fail to perceive why the jurisdiction of the court below was
20 not well exercised. It is certainly a well-settled principle that, in cases like the present, the *lex loci rei sitæ* must alone furnish the rule for determining the validity of the assignment and the preferences thereby created; and, though the instrument may be valid according to the principles of the common law, it can hardly be contended that its validity can be maintained in defiance of the express terms of a statute declaring it to be absolutely void. Whart. Confl. Laws, secs. 297, 312, 802. The deed of assignment was made and accepted with reference to the terms of the statute that we have quoted, and with the implied condition annexed that, if the assignor was proceeded against in insolvency within four months and declared an insolvent, the deed would fall as a necessary legal consequence. This results from the general principle well established that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms, and this rule embraces alike those which affect its validity, construction, discharge, and enforcement. Ogden *vs.* Saunders, 12 Wheat., 353; Von Hoffman *vs.* City of Quincy, 4 Wall., 535; Edwards *vs.* Kearzey,
21 96 U. S., 595, 601. Therefore, under the statute to which we have referred, the making the deed of assignment was clearly an act of insolvency, subjecting the debtor to adjudication,

and such adjudication of the debtor as an insolvent, based upon the fact of his making the assignment, of necessity involves the determination that the deed of assignment contravenes the provisions of the statute and is consequently void.

But it is insisted that as the non-resident parties interested in maintaining the deed of assignment have not been served with process, and as foreign creditors they could not be required to appear and subject themselves to be bound by the insolvent proceedings, no adjudication can be had that would affect the assignment or the rights of the parties thereunder; and if that position be correct it would be entirely futile to proceed against the insolvent debtor, for though he might be adjudicated an insolvent, yet his property would be withheld from administration under the insolvent law and the mass of his creditors get nothing. But is it
22 necessary to serve or attempt to serve process on the non-resident creditors? It is certainly unnecessary to do a nugatory thing or a thing that is without practical effect upon the rights of any one. It is conceded that the non-resident creditors could not be required to come in against their own consent and thus subject their original contracts with the debtor to the operation of the State insolvent law; and it was certainly not necessary to make such creditors parties in order to confer jurisdiction upon the court to proceed against the insolvent debtor, nor was it essential to the power of the court to declare the debtor an insolvent. Such an adjudication declares the status of the debtor and is a judgment *in rem* or in the nature of a judgment *in rem*, and as such it is conclusive and binds all persons, whether parties or otherwise, as to the particular point or matter decided. 2 Tayl. Ev. (6th ed.), secs. 1487, 1488, 1489; Freeman on Judg'ts, secs. 606 to 610. And such being the nature of the judgment required to be passed against the insolvent debtor, all the legal incidents within the terms of the statute necessarily follow, and
23 among these is the absolute avoidance of the deed creating the illegal preferences, because the statute so expressly declares. Such, certainly, is the result in the case of a deed like the present, where both the insolvency of the debtor and the illegal preferences to the creditors are apparent upon the face of the deed; for in such case the deed is made void *ipso facto, et constructone legis*, and in no way depends upon any express declaration of the court apart from the adjudication of the debtor to be an insolvent. The statute, by force of its own terms, operates upon the deed and (unlike in the cases provided for in section 25 of art. 48) strikes it down from the moment the debtor is adjudicated an insolvent, the illegal preference being the basis of the adjudication; and in such case no defence could be interposed to rescue the deed from the fate declared for it by the statute. The adjudication, with all its direct legal incidents and consequences, binds every one, unless it can be shown to have been procured by fraud or collusion.

24 In the 2d vol. of Taylor's Evidence (6th ed.), secs. 1488, 1489, will be found stated the various cases wherein the adjudications have been treated as judgments *in rem*, and among these

is classed the case of adjudication in bankruptcy, and it is based upon the reason that such adjudication is the judicial declaration of the status of the bankrupt and his effects, such adjudication being classed with that granting probate and with sentences passed in matrimonial cases. "These judgments," says the author, "so far furnish conclusive evidence of the points they decide, not only against the parties who were the actual litigants in the cause, but against all others, that, unless it can be shown either that the court had no jurisdiction or that the judgment was obtained by fraud or collusion, no evidence can be admitted, at least in any civil cause, for the purpose of disproving the facts adjudicated. This rule appears to rest partly upon the ground that in most of the above cases every one who can possibly be affected by the decision is entitled, if he think fit, to appear and assert his
25 own rights by becoming an actual party to the proceedings, and partly upon the ground that judgments *in rem* not merely declare the status of the subject-matter adjudicated upon, but *ipso facto* render it such as they declare it to be." See also 1 Stark. Ev., 286, and Mankin *vs.* Chandler & Co., 2 Brock., 125. The insolvent court is open to any and all persons who may possibly be affected by the adjudications of that tribunal upon the status of the debtor alleged and shown to be insolvent, and those who have rights to assert must appear and assert them at the proper time.

The fact, therefore, that the foreign creditors were not served with process and could not have been compelled to become parties to the insolvent proceedings, even if they had been served, cannot be assigned as ground of error in the order of the court below. That order is not objectionable, because it declares in terms the deed of assignment to be void, that being the legal result of the adjudication of insolvency founded thereon, as declared by the statute.
26 The order appealed from will be affirmed.

Order affirmed and cause remanded.

Order affirmed with costs and cause remanded by the court on the 14th day of June, 1888. Appellees' costs in the court below, $12.15. Appellees' costs in court of appeals, $36.20 & costs.

27 SOLOMON BROWN, Appellant,
vs.
THEODORE B. SMART, JOSEPH H. PATTERSON, and Wilmot L. Rice, Copartners Trading as Smart, Patterson & Rice, Appellees.
} In the Court of Appeals of Maryland.

To the Honorable Richard H. Alvey, chief judge of the court of appeals of Maryland:

Solomon Brown, the appellant in the above-entitled case, respectfully prays your honor to allow a writ of error to the Supreme Court of the United States to be transmitted to said court with the record and proceedings in said cause, because, he says, in said record and proceedings and in the rendition of the judgment of the court of appeals therein error hath happened to the great damage of him, the said Solomon Brown, there having been drawn in question

therein the validity of a statute of and an authority exercised under the State of Maryland on the ground of their being repug-
28 nant to the Constitution of the United States, and the decision of said court of appeals being in favor of such their validity, and there having been drawn in question therein the construction of a clause of the Constitution of the United States and the decision of the said court of appeals being against the title and right specially set up and claimed under such clause of the said Constitution.

And as in duty, &c.

CHARLES MARSHALL,
THOMAS W. HALL,
Of Counsel for Solomon Brown.

The writ allowed as prayed.
August 4th, 1888.

R. H. ALVEY,
Chief Judge Court of Appeals.

29 The United States of America to Theodore B. Smart, Joseph H. Patterson, and Wilmot L. Rice, copartners trading as Smart, Patterson and Rice, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Maryland, wherein a certain Solomon Brown is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment and decision rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard Henry Alvey, chief judge of the said court of appeals of Maryland, this 22d day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

R. H. ALVEY.

Service of copy admitted for Smart, Patterson and Rice Sept. 22d, 1888.

CHARLES POE, *Attorney.*

30 Know all men by these presents that we, Isaac Eichberg, of Alexandria, Virginia, and Edward H. Wise, of Baltimore, Maryland, are held and firmly bound unto Theodore B. Smart, Joseph H. Patterson, and Wilmot L. Rice, copartners trading as Smart, Patterson & Rice, in the full and just sum of two hundred and fifty dollars, to be paid to the said Smart, Patterson & Rice, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a session of the court of appeals of Maryland, in a suit depending in said court between a certain Solomon Brown and the said Theodore B. Smart, Joseph H. Patterson, and Wilmot L. Rice, copartners as aforesaid, the decision and judgment of said court was against the said Solomon Brown, and the said Solomon Brown having obtained a writ of error and filed a copy thereof
31 in the clerk's office of the said court to reverse the judgment and decision aforesaid of said court of appeals of Maryland in the aforesaid suit, and a citation directed to the said Theodore B. Smart, Joseph H. Patterson, and Wilmot L. Rice, copartners as aforesaid, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ of error to effect and answer all costs if he shall fail to make his said writ of error good, then the above obligation to be void; else to remain in full force and virtue.

ISAAC EICHBERG. [SEAL.]
EDWARD H. WISE. [SEAL.]
—— ——. [SEAL.]

Sealed and delivered in presence of—
JACOB BROWN.
HARRY BROWN.

Approved by—
R. H. ALVEY,
Chief Judge.

32 UNITED STATES OF AMERICA, *ss:*

[Seal's place.] The President of the United States of America to the honorable the judges of the court of appeals of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of Maryland, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between Solomon Brown, appellant, *vs.* Theodore B. Smart, Joseph H. Patterson, and Wilmot L. Rice, copartners trading as Smart, Patterson & Rice, appellees, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States,
33 and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, a manifest error hath happened, to the great damage of the said Solomon Brown, as by his complaint appears, we, being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done
34 therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, senior associate justice of the said Supreme Court, the sixth day of August, in the year of our Lord one thousand eight hundred and eighty-eight.

Issued 6th August, 1888.

JAS. W. CHEW,
Clerk Circuit Court of the United States, District of Maryland.

Allowed by—
R. H. ALVEY,
Chief Judge, Court of Appeals.

35 STATE OF MARYLAND, *City of Annapolis,* } *To wit:*

I, Spencer C. Jones, clerk of the court of appeals of Maryland, at Annapolis, in obedience to the mandate of a writ of error awarded by the Honorable Richard H. Alvey, chief judge of the court of appeals of Maryland, bearing date the 6th day of August, 1888, do hereby certify that the foregoing record is a true transcript of the record and proceedings in the case of Solomon Brown *vs.* Smart, Patterson and Rice, as the same remains on file in the clerk's office of the said court of appeals.

And I do further certify that the said court of appeals is the highest court of law or equity in said State in which a decision can be had in said case.

And I do further certify that the foregoing bond in said record is a true copy of the bond in said case which was filed in my office on the 29th day of September, 1888.

And I do further certify that the foregoing writ of error in said record is a true copy of said writ awarded by the said the Honorable Richard H. Alvey, chief judge as aforesaid, to the judg-
36 ment of said court, and I herewith transmit the original of said writ; and I further certify that a copy of said writ was duly filed in my office for the State of Maryland on the 11th day of August, 1888.

And I do further certify that the copy of the opinion of the court of appeals in said record is a true copy of the same as rendered by said court in said case and on file in my office, and that said judgment in said court of appeals in said case was rendered on the 14th day of June, 1888.

In testimony whereof I have hereunto subscribed my name as clerk of the said court of appeals of Maryland and affixed the official seal of said court, at my office in Annapolis, Maryland, on the 3d day of October, A. D. 1888.

Seal Court of Appeals, Maryland.

SPENCER C. JONES,
Clerk Court of Appeals of Maryland.

Endorsed on cover: Maryland court of appeals. No. 163. Solomon Brown, plaintiff in error, *vs.* Theodore B. Smart, Joseph H. Patterson, and Wilmot L. Rice, copartners trading as Smart, Patterson & Rice. Filed October 8, 1888.

Office Supreme Court U. S.
FILED.
DEC 8 1891
JAMES H. McKENNEY,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

EVA BROWN,

EXECUTRIX OF SOLOMON BROWN,

Plaintiff in Error,

vs.

THEODORE SMART AND OTHERS,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES MARSHALL,

For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

EVA BROWN,

EXECUTRIX OF SOLOMON BROWN,

Plaintiff in Error,

vs.

THEODORE SMART AND OTHERS,

Defendants in Error.

This is a writ of error to the Court of Appeals of the State of Maryland to review a judgment of that Court.

The facts are as follows:

Solomon Brown, the testator of the plaintiff in error, a citizen of the State of Maryland, on the 30th day of November, 1887, executed a deed of trust for the benefit of his creditors to Isaac Eichberg, a citizen of the State of Virginia, by which he conveyed to Eichberg all his property of every kind, in trust, to take possession of it forthwith, reduce the same to money, and after paying all expenses of executing the trust, to apply the net residue to the payment equally and without priority of debts of the grantor, amounting in the aggregate to $13,600, due

to certain persons named in the deed, all of whom are citizens of other States than the State of Maryland, and in trust, after paying these preferred debts, to pay all the other creditors of Brown equally and ratably. The deed further sets forth that the creditors who are preferred are so preferred in consideration of their agreement to accept the provisions made in their favor by the deed in full satisfaction of their claims against Brown, and to release him from any part of their claims that may fail to be satisfied by the proceeds of the property conveyed by the deed.

On the 8th day of December, 1888, the defendants in error, all of whom are citizens of New York, filed a petition in the Court of Common Pleas of Baltimore City, against Brown, to have him adjudicated an insolvent debtor under the laws of Maryland, alleging as an act of insolvency, the execution of the deed above mentioned to Eichberg, claiming that the preferences created by the deed in favor of the non-resident creditors were undue preferences within the meaning of the insolvent law.

The prayer of the petition is that Brown be adjudicated an insolvent debtor, and that the deed of trust be decreed to be void and of no effect.

Process is prayed against Brown & Eichberg and the preferred creditors.

The petition as first presented did not contain the averment that Brown, when he made the preferences, was "insolvent, or in contemplation of insolvency," which is a material averment under the law of Maryland. The pleader supposed that as he had filed a copy of the deed as an exhibit, with the petition, and the deed was supposed to show on its face that at its date Brown was actually insolvent, no averment of that fact was necessary.

The defendant Brown demurred to the petition as it stood when filed, and the Court permitted it to be amended by inserting the necessary allegation, and thereupon overruled the demurrer and ordered Brown to answer.

Thereupon he answered, and averred that the preferences contained in the deed were not illegal, because all the preferred creditors resided out of the State of Maryland, and that they were creditors under contracts made and to be performed out of Maryland, and that each and all of the creditors had agreed with Brown, at the time of the execution of the deed, to accept its provisions in full satisfaction of their respective claims against him, and that each of said creditors, in consideration of the provision made for him in the deed, had released the said Brown.

As a second defence, the answer averred that the Court had no jurisdiction to decide as to the validity of the deed of trust, especially, because the parties interested, both the trustee and the preferred creditors, were beyond the jurisdiction of the Court, and had not, in fact, been served with process, or otherwise made parties, even conceding that the Insolvent Court could compel the non-resident creditors and trustee to submit themselves to its jurisdiction, which he denied.

The Court of Common Pleas overruled both defences, adjudged Brown to be an insolvent debtor, and declared the deed to be null and void. The judgment was rendered upon the facts shown in the petition and answer, as if upon a demurrer to the answer.

Upon appeal by Brown to the Court of Appeals of Maryland, the judgment was affirmed on both points decided by the Insolvent Court, and from that judgment, Brown sued out a writ of error, alleging as the error complained of that there had been drawn in question the validity of a statute of, and an authority exercised under the State of Maryland, on the ground of these being repugnant to the Constitution of the United States, and the decision having been in favor of their validity, and also that the construction of a clause of the Constitution of the United States had been drawn in question, and the decision had been against the title and right claimed under such clause.

The judgment of the Court of Appeals declares the deed of trust made by Brown to Eichberg to be null and void by force of the insolvent law of Maryland, and its effect is to annul the contract by which Brown paid and satisfied his obligations to his non-resident creditors named in the deed of trust, because said contract is held to be void under the said insolvent law of Maryland.

The Insolvent Law of Maryland, in force when the deed of trust was made by Brown, was the Act of 1886, chapter 298, now contained in the Maryland Code, Art. 47.

The provisions of the law, to which it is necessary to call attention in the argument of this case, are as follows: (Code of Public General Laws, Art. 47, Secs. 1, 8, 14, 22, 23 and 24.)

1. Any person being insolvent may apply, by petition, to the Circuit Court for the county where such insolvent resides, or to the Court of Common Pleas of Baltimore city, if the insolvent resides in the city of Baltimore, stating that he is insolvent, and offering to deliver up, for the benefit of his creditors, all his property, real and personal, and exhibiting therewith a schedule of his property, and a list of the debts due from and owing to him, with the names of his debtors and creditors, and their respective places of business or residence, so far as known to the insolvent, all verified by affidavit; and shall annex to his petition an affidavit that he will deliver up and convey to such trustee as may be appointed, for the benefit of his creditors, all the property, estate, rights and claims, of every description to which he is in any manner entitled; the necessary wearing apparel and bedding of himself and family, and such property as may, by law, be exempted from execution, excepted; and that he has not at any time sold, lessened, transferred or disposed of any part of his money or other property for the use or benefit of any person, or intrusted any part of his money or other property, debts, rights or claims, thereby intending to delay or

defraud his creditors, or any of them, or to secure the same so as to receive, or expect to receive, any profit, benefit or advantage himself therefrom; provided, that the said applicant has at no time within two years previous to said application been discharged under any insolvent law of this State.

8. Any confession of judgment, and any conveyance or assignment made by any insolvent under this article, for the purpose of defrauding his creditors, or giving an undue preference, shall be void, and the property or thing conveyed or assigned shall vest in the trustee; and all acts done by the petitioner before his application, when he shall have had no reasonable expectation of being exempted from liability to execution, on account of his debts or responsibilities, without petitioning for the benefit of the insolvent laws, shall be deemed to be within the meaning and purview of this section.

14. No deed or conveyance executed, or lien created by any banker, stock broker, merchant, manufacturer or trader being insolvent, or in contemplation of insolvency, shall be lawful or valid if the same shall contain any preferences, save such as result from operation of law, and save those for the wages or salaries to clerks, servants and employees contracted not more than three months anterior to the execution thereof; and all preferences, with the exceptions aforesaid, shall be void, howsoever the same may be made; provided, the grantor or party creating said lien or preference shall be proceeded against under section 23, or shall apply for the benefit of this article under section 1, within four months after the recording of the deed or conveyance, or the creation of said lien or preference, and shall be declared, or shall become, under the provisions of this article, an insolvent.

22. Any person who shall depart from or remain absent from this State with intent to hinder, delay or defraud his creditors, or conceal himself to avoid service upon him in

any action for the recovery of a debt, and any person who conceals or removes any of his property to prevent the same from being taken under legal process, or makes an assignment, gift, sale, conveyance or transfer of all or part of his estate or property with the intent to delay, hinder or defraud his creditors, or belonging to any of the classes mentioned in section 14 of this article, when insolvent or in contemplation of insolvency, executes a deed or conveyance giving preferences, creates a lien making any unlawful preferences as therein stated, or otherwise gives such preferences, or belonging to said last-mentioned classes, when insolvent or in contemplation of insolvency, confesses any judgment or allows any judgment to be entered against him by any connivance, or belonging to any of said classes, when insolvent or in contemplation of insolvency, fraudulently stops payment or suspends payment of his negotiable paper and fails to resume payment thereof within twenty days, or being a banker or broker, shall fail for twenty days to pay any depositor on demand lawfully made, shall be deemed to have committed an act or acts of insolvency, as the case may be; provided the petition mentioned in the succeeding section is filed within four months after the act of insolvency is committed.

23. A petition may be filed in any of said Courts having the right to take jurisdiction of the debtor so committing any act of insolvency in the preceding section mentioned, by any one or more creditors, the aggregate of whose debts against the insolvent amounts to at least the sum of two hundred and fifty dollars, at any time within four months after the recording of any of the conveyances, creation of liens, or committing of any of the acts of insolvency in this article specified; the said petition shall allege the facts upon which the application is grounded, and pray for process against the debtor and an adjudication of insolvency, and shall be verified by the affidavit of the petitioner; the Court shall thereupon issue summons

for the debtor and require him to show cause in not less than five nor more than ten days why such adjudication shall not be made; upon any issue of fact which may arise out of said petition and answer, either party shall be entitled to a trial by jury, but the parties to said cause may waive the jury trial and be heard by the Court on the issue of fact, and the trial shall take place at the term during which the petition was filed, and as speedily as may be, and if the petition be filed in any Circuit Court for any county during the term and whilst the jury shall be in attendance thereon, the Court shall not discharge the petit jury until the parties to said petition shall file their waiver of a jury trial, as hereinbefore provided; and if the petition be filed in any such Court after the jury has been discharged for the term, the Court or any judge thereof, shall, upon the demand of a jury trial by either party as aforesaid, order the sheriff to summon a special jury, which shall be convened in not less than five nor more than ten days from the date of such order, to hear and determine the question of fact between the parties; provided, that the said petition shall be filed more than thirty days prior to the beginning of a new term of said Court, and pending the determination of the application for such adjudication, and pending any question of the validity of any preference by mortgage, judgment or otherwise, and of any gift, sale, assignment, conveyance, or transfer or removal of all or any part of the property of the debtor with intent to hinder, delay or defraud his creditors, or to give an unlawful preference to any creditor, endorser or surety, the Court, or any judge thereof, shall, on the application of the petitioner, issue an order in the nature of an injunction, to restrain the debtor and the mortgagee, judgment creditor, donee, vendee, assignee, grantee, or other person having the custody or claiming the title to any property or estate of the debtor, from selling, disposing of, or in any way interfering with said property or estate, until the question of adjudication shall have been determined, and may issue such other

orders upon such terms and conditions as the Court may deem necessary for the preservation and safe-keeping of the property in controversy; and the Court shall possess the power to allow any amendments necessary to present the rights of the matter. If the allegations of the peti tioner shall not be sustained the respondent shall recover a judgment for costs against the petitioner; and if the allegations be sustained, and are sufficient to warrant the same, an adjudication shall be made by the Court that the debtor is insolvent; and therefore, and by virtue of the adjudication, his right and power to dispose of any part of his estate and property shall cease; and when the Court shall have appointed a preliminary trustee, all such estate and property shall, as soon as the bond of such trustee shall have been approved, be divested out of the insolvent and be vested in the trustee; and thereafter the same proceedings shall be had as hereinbefore prescribed in relation to persons who shall apply for the benefit of the provisions of this article; and the said debtor shall thereupon immediately execute the schedule and lists of debts, verified by his affidavit, as provided by section 1 of this article, and the debtor shall be entitled to his discharge from all debts and contracts made before the filing of the petition in this section mentioned, and in the same manner and to the same extent, and with the same exception, as though he had made application, as provided in section 1 of this article.

24. If any deed, conveyance, assignment, gift, transfer or delivery be made of any goods, chattels, moneys, choses in action, lands, tenements or other property, or lien created thereon by any person belonging to any of the classes mentioned in section 14, when insolvent or in contemplation of insolvency, the same shall be *prima facie* intended to hinder, delay and defraud the creditors of the person by whom the same is made, and the burthen of proof shall rest upon him and the grantee to explain the same and show the *bona fides* thereof; provided, the

creditors of the grantor in such deeds, conveyances or assignments shall avail themselves of the provisions of this article.

The right of a debtor to give a preference to one or more creditors is indisputable in Maryland, unless the debtor apply voluntarily for the benefit of the Insolvent Law, or is adjudged an insolvent by proceedings under section 22.

Castleberg vs. Wheeler, 68 Md. 275.

It will not be pretended that the deed from Brown to Eichberg and the contract between Brown and his foreign creditors were not entirely legal and valid under the laws of Maryland until the adjudication against Brown in insolvency on the 31st of March, 1888, It appears by the answer of Brown that his foreign creditors agreed with him at the time of the execution of the deed to accept the provisions thereby made for them, in full satisfaction of their claims against him, and actually carried that agreement into effect by executing releases to him. Record, page 6.

Therefore, from the date of that deed, November 30, 1887, to the date of the adjudication against Brown, 31st March, 1888, Brown had, by an executed contract between him and divers creditors, citizens of other States, discharged and satisfied his obligations to those citizens, that contract being at the time perfectly valid under the laws of Maryland. But by an adjudication under the Insolvent Law of that State, that contract was declared null and void, and the property appropriated by the terms of the contract to the payment of the foreign creditors, was taken from them and placed in the hands of the trustee in insolvency, beyond the reach of the foreign creditors, unless they should submit to the jurisdiction of the Insolvent Court, and by becoming parties to the proceed-

ings in insolvency, become bound by the discharge of their debtor under the Insolvent Law of Maryland.

The effect of this judgment, so far as Brown is concerned, is to revive his indebtedness to his foreign creditors, inasmuch as it takes away the consideration of the releases given by them to Brown, and declares the contract between them by which he obtained his release to be illegal and void.

This adjudication was made in a case in which neither the trustee, Eichberg, named in the deed of trust from Brown, nor any of the creditors of Brown preferred by that deed, are parties. Not only are those creditors not made parties, but it is admitted that they could not be compelled to become parties to the insolvent proceedings against Brown.

It will be seen by a reference to the Record, page 6, that one of the defences taken by Brown in the Court below, was, the denial of the jurisdiction of the Court to decide upon the validity and effect of the deed of trust, among other reasons, because such an adjudication could not be made in any Court which has not acquired jurisdiction over the creditors named in the deed of trust, either directly, or by representation through the trustee. He avers that neither the trustee named in the deed, nor any of the creditors secured thereby, have been served with process, or otherwise been made parties to these proceedings, and he asks the benefit of that defence as to so much of the petition as prays that the deed may be declared void, as if the defence had been taken by plea to the jurisdiction or by demurrer. This defence was overruled by the Court of Common Pleas and its judgment affirmed by the Court of Appeals of Maryland.

Assignment of Error.

The plaintiff in error assigns as error in the judgment of the Court of Appeals of Maryland, that the Insolvent Law

of Maryland, as expounded by the judgment of said Court of Appeals, is in conflict with the first section of the fourteenth amendment of the Constitution of the United States, inasmuch as said law so expounded deprives the plaintiff in error of a right without due process of law, contrary to said first section of the fourteenth amendment of the Constitution of the United States.

The defence taken in the Court of Common Pleas, does not aver in so many words that the Insolvent Law of Maryland, so far as it provides for an adjudication as to the validity of the deed of trust, is repugnant to the first section of the fourteenth amendment, nor was it necessary that it should do so.

Spencer vs. Merchant, 125 U. S. 352.

It sets out as a defence to the petition, that the Court had no jurisdiction to declare the deed void in this suit, because such a judgment cannot be rendered in a case in which some of the parties to be affected by that judgment, are not in fact, and cannot be compelled to become parties to the suit.

It was not necessary to aver what provision of the Federal Constitution was inconsistent with a law that would warrant such a judgment in such a case. If the Insolvent Law of the State of Maryland warranted such a judgment under the circumstances stated in the plea, the Insolvent Law warrants a judgment by which persons not parties, and who cannot be made parties to the suit, are deprived of their rights and property, and to render such a judgment is in effect to deprive those persons of their rights "without due process of law," by force of the law under which the judgment is rendered.

The Court of Appeals passed upon this defence, and upheld the law that warranted the judgment complained of.

See opinion of Court, page 9, Record.

Brown was a party to the proceeding in insolvency, but it is submitted that he is properly before this Court to complain of the adjudication of the Court of Appeals, by which the deed of trust is declared to be void under the Insolvent Law of Maryland, if that law is in conflict with the Constitution of the United States.

In Gibbons vs. Ogden, 9 Wheaton, 1, cited in Transportation Co. vs. Parkersburg, 107 U. S. 705, it is said "the Court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State have, in their application to this case, come in collision with an Act of Congress, and deprived a citizen of a right to which the Act entitled him."

The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority, be done.

Stuart vs. Palmer, 74 N. Y. 183.

If the Insolvent Law of Maryland, as expounded by the Court of Appeals of that State, warrants the judgment in this case, declaring the deed of trust from Brown to Eichberg to be void, neither Eichberg the trustee, nor the foreign creditors, secured by the deed, being parties, and it not being possible to make them parties to this suit, it is submitted that the Insolvent Law of Maryland "comes in collision to that extent with the Constitution of the U. S. 14th Amendment, section 1.

The Court will also observe that the insolvent law itself, section 24, contains a provision that when a deed is made by any person belonging to any of the classes mentioned in section 14, when insolvent or in contemplation of insolvency, "the same shall be *prima facie* intended to hinder, delay and defraud the creditors of the person by whom the same is made, and the burden of proof shall rest upon him *and the grantee* to explain the same, and show the *bona fides* thereof."

Now, this section evidently contemplates that the grantee shall have an opportunity to be heard in defense of

his rights, and yet the law contains no provision for notice to him of any kind, and if it did, it is not pretended that he, if a citizen of another State, could be legally required to submit himself to the jurisdiction of the Insolvent Court of Maryland.

Yet, by the judgment of the Court of Appeals in this case, the Insolvent Law of Maryland warrants the Insolvent Court in pronouncing upon the rights of the grantee in his absence, and in the absence of power to make him a party to the proceeding in insolvency.

If the law is void as thus expounded, because repugnant to the fourteenth amendment of the Constitution of the United States, any judgment enforcing such a law is void as to all parties affected by it, including the plaintiff in error in this case.

Before the enactment of the present Insolvent Law of Maryland, 1886, ch. 298 (now contained in the Code,) there was a law almost identical with it, so far as invalidating preferences made by persons in insolvent circumstances are concerned, but it was never supposed that the mere adjudication of a debtor as an insolvent, would per se, invalidate all preferences.

The trustee in insolvency always proceeded by appropriate actions at law or in equity, as the case might be, to procure such preferences to be set aside by the Courts, and in all such suits, of course those who were sought to be affected by them were made parties. No decree or judgment could have been rendered in such suit, unless all necessary parties were in Court, and the Court of Appeals gives greater effect to the adjudication in insolvency, than to a plenary suit.

If the foreign creditors of Brown had been actually paid by him in money, it would hardly be pretended that had the petitions against him in insolvency alleged such payments as the act of insolvency committed by him, it would be possible for the Insolvent Court to decree in this suit, the repayment of the money by the creditors who had been paid.

Yet this Record shows an executed contract between Brown and his foreign creditors, which was completed and executed at the date of the deed of trust, and which would have remained perfectly legal and valid under the laws of Maryland to this day, but for the adjudication in insolvency against Brown, nearly four months after the date of the deed.

Castleberg vs. Wheeler, 68 Md. 275–6.

It will not be denied that apart from the Insolvent Law of Maryland, by the general law of that State, parties may agree upon a mode of paying a debt, other than in money, and when such substituted payment is made and accepted, it is as complete a performance and discharge of a contract as payment in money would be.

Larrabee vs. Talbott, 5 Gill, 441, citing—
Gregory vs. Mack, 3 Hill, N. Y. 384.

This was done in this case. The deed of trust was accepted by the foreign creditors as a satisfaction of their demands, and they released Brown. Four months later, by a judgment rendered in a case in which they were not parties, this payment is annulled and declared void, by the operation of a Maryland law.

The involuntary feature of the Insolvent Law of Maryland, resembles the same feature in the late Federal Bankrupt Law, and the Court of Appeals has decided that the proceedings under the former should be made to conform as nearly as possible to those under the latter.

This Court has held under the Bankrupt Law, that in cases arising between the assignee of a bankrupt and persons claiming property or rights under the bankrupt, the assignee cannot proceed by summary process, to recover the property, and that such summary proceeding is not due process of law.

It has been held that the assignee must assert his rights by plenary proceedings appropriate to the nature of his cause of action, at law or in equity, and that such proceeding only is due process of law. It has expressly held

that "strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared, and become parties to such litigation, cannot be compelled to come into Court under a petition to show cause."

Mason vs. Smith, 14 Wal. 419, 432–3.
Marshall vs. Knox, 16 Wal. 551.

This Court has repeatedly declared that the Insolvent Laws of one State cannot be extended to persons and contracts not within the jurisdiction of the State, for the very reason that all persons are entitled to notice. In the case of Baldwin vs. Hale, 1 Wallace, page 233, this Court says, (speaking of the decision of Scribner vs. Fisher, 2 Gray, page 43, in which it was declared that if the contract was to be performed in the State where the discharge was obtained, the discharge is a good defence to an action on the contract, although the plaintiff was a citizen of another State, and had not in any manner become a party to the proceeding.) "Irrespective of authority, it would be difficult, if not impossible, to sanction that doctrine. Insolvent systems of every kind partake of the nature of a judicial investigation. Parties whose rights are to be affected are entitled to be heard, and in order that they may enjoy that right, they must first be notified. Common justice requires that no man shall be condemned in his person or property, without notice and an opportunity to make his defence. Regarded merely in the light of principle, therefore, the rule is one that can hardly be defended, as it is quite evident that the Courts of one State would have no power to require citizens of other States to become parties to any such proceedings."

Further on, after citing a number of Federal and State decisions, the Court uses the following language:

"Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra territorial operation, and consequently the tribunal

sitting under them, unless in case where a citizen of such other State, voluntarily becomes a party to the proceeding, has no jurisdiction in the case, legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default."

This language is used, it is true, with reference to the effect of a debtor's discharge under the Insolvent Laws of a State, upon his obligations to his non-resident creditors, but it is submitted that the principle is applicable to the case at bar. Such discharges, this Court says, "partake of the nature of a judicial investigation;" and hence, "parties whose rights are to be affected, are entitled to be heard." Now, in this case, there has been a judicial investigation, which has resulted in a judgment that the deed of trust is a nullity, and that judgment has been rendered in the absence of the parties most interested in the result; parties who were not only absent, but who had a right to be absent, and who could not be required to appear.

The Court of Appeals of Maryland, in answer to the defence that the Court could have no jurisdiction in this case to declare the deed void because of the absence of the necessary parties affected by such a judgment, held that the adjudication of the debtor as an insolvent, necessarily carried with it the adjudication as to the validity of the deed of trust and the contract set forth in that deed of trust, as against all persons, because the proceeding was in the nature of a proceeding *in rem*. They held that the adjudication established the status of Brown as an insolvent, and that carried with it all the consequences declared by the statute to be incident to that status, and that all persons were bound by that adjudication, as persons are bound by adjudications in a case *in rem*. But, it is submitted, that even in proceedings *in rem*, the law must provide for some form of notice to parties who may be interested in the judgment that the Court is asked to render. In admiralty, and in all other proceedings *in rem*

some form of notice is given. It may be actual, or it may only be constructive, but the laws of all civilized countries recognize the primary obligation of a Court of justice to give notice of some kind to all persons, upon whose rights the Court is asked to pass.

The Insolvent Law of Maryland contains no provision for notice to those who may be affected by the adjudication, even if non-residents could be required to become parties to it.

Windsor vs. McVeigh, 93 U. S. 278–9.
Sabariego vs. Maverick, 124 U. S. 292–3.

The Court of Appeals of Maryland has upheld the principle contended for in this case to its utmost limit.

See Ulman vs. The Mayor, &c., 72 Md. 587.

It is respectfully submitted that the Insolvent Law of Maryland, so far as it is held to warrant such a judgment as that complained of here, attempts to do what no State can do. In the language of this Court in Cook vs. Moffatt, 5 Howard, 295, the State of Maryland has attempted to "inflict her bankrupt laws on contracts and persons not within her limits," and to do that, has by her law, as expounded by the Court of Appeals, made provision for adjudicating upon the rights of persons who neither are nor can be brought within her jurisdiction.

The insolvent law, as expounded by the Court of Appeals, is an attempt on the part of the State to exercise powers that belong to Congress only.

The case is like that described by this Court in Transportation Company vs. Parkersburg, in 107 U. S. 701.

"There are cases it is true, which are so natural in their character, and in which it is so essential that a general or natural rule should exist, that any inteference by the State Legislature therewith, is justly deemed to be an invasion of the power and authority of the general government, and in such cases the Courts will interfere to

prevent or redress the commission of acts done or attempted to be done under the authority of such unconstitutional laws.

"In such cases, the non-action or silence of Congress will be deemed to be an indication of its will."

The Court of Appeals of Maryland decided a case very much like the present, exactly the other way.

In the case of Larrabee vs. Talbott, 5 Gill, 426, R. & F., residents and citizens of Maryland, and doing business in Baltimore, had purchased goods in New York from B., a resident and citizen of New York, and had given B. their note for the price of the goods.

F. & R. being embarrassed and in contemplation of insolvency, assigned to L, also a citizen and resident of Baltimore, agent of B, certain merchandise, and choses in action, in payment of the note. F. & R. became insolvent, applied for the benefit of the Insolvent Laws of Maryland, and were discharged under those laws.

Their Permanent Trustee in Insolvency demanded of L, the goods and choses in action received of the latter for B, the New York creditor, and brought an action against L., for the conversion of that property, claiming that by the provisions of the Insolvent Law the transfer of the merchandise and choses in action by F. & R. to L, in payment of the debt to B., having been made "with intent to prefer B., at a time when F. & R. had no reasonable expectation of being exempted from liability or execution for or on account of their debts without applying for the benefit of Insolvent Laws," was null and void under those laws.

The law of Maryland at that time declared all such transfers of property or payments made by persons in the conditions F. & R., as above described, void, if the debtor took the benefit of the Insolvent Laws, just as the present law makes preferences void if the debtor goes or is thrown into insolvency, but the Court sustained the assignment of the goods by F. & R. to L., in payment of the debt due B.,

against the claim of the Trustee in Insolvency, notwithstanding the goods with reference to which the contract was made were in Baltimore at the time, a circumstance which, it will be seen by reference to the opinion of the Court in this case, was allowed to have a controlling effect in deciding upon the validity of the deed of trust made by Brown.

It will be seen that in Larrabee vs. Talbott, it was not pretended that the fact that Frick & Rogers had been adjudicated insolvent debtors, had any effect upon the assignment made to Larrabee for Berrien & Co., but the trustee in insolvency brought an appropriate action at law to recover the property assigned. The Court decided against the claim of the trustee, and held the assignment to be valid. It is true the reason given for the judgment cannot be sustained, in view of the decision of this Court in The New Orleans Water Works Company vs. The La. Sugar Refining Company, 125 U. S. 18.

The Court of Appeals held in Larrabee vs. Talbott, that the Insolvent Law of Maryland, if applied to that case, would be unconstitutional because it impaired the obligation of the contract between the debtors and their foreign creditors, and was thus in contravention of article 1, section 10, of the Constitution of the United States.

But the law of Maryland under which the Court held to be unconstitutional for the reason above stated, was passed in 1834, seven years before the contract between the debtors and their foreign creditors, and could not possibly come under the prohibition of article 1, section 10, of the Constitution, as the law is settled in that respect by the decision in 125 U. S., page 28.

In the course of the opinion in Larrabee vs. Talbott, however, the Court speaks of the illegality of any attempt on the part of the State of Maryland to subject non-

residents to the operation of her Insolvent Law. At page 441, the Court uses the following language:

"Now, we find that Rogers and Frick, in fulfillment of this obligation (meaning their debt to Berrien & Co., of New York,) transferred to Berrien & Co. on the 12th of May, 1841, the property sought to be recovered, in payment of their indebtment, and that it was so received by Berrien & Co. And can it be maintained that a law which invalidates this transfer, annuls this payment, takes from the creditors the property which they had fairly acquired in the exercise of a right conferred upon them by the common law, and places it in the hands of the trustee to be distributed exclusively among the domestic creditors of the insolvent debtors, unless the foreign creditors will take their dividend upon the humiliating condition of surrendering their acknowledged constitutional privilege to object to the insolvents' discharge, is not a law impairing the obligation of the contract? We think not. A proposition of this kind cannot be maintained."

Now while it is true that a law made before a contract is made, cannot be said to be a law that impairs its obligation within the meaning of Art. 1, Sec. 10, of the Constitution, it might with great force be asked whether a law that warrants a judgment by which all the results mentioned in the question are accomplished, in a case in which the foreign creditors affected by the judgment are not parties, and cannot be made parties, is a constitutional law within the meaning of the first section of the fourteenth amendment of the Constitution of the United States.

Larrabee and Talbott has never been changed until now, so far as the point immediately decided in that case is concerned.

A dictum in Larrabee and Talbott, on the subject of the right of a foreign creditor to seize property of the debtor in the hands of his insolvent trustee upon execu-

tion on a judgment against the insolvent (a question not at all before the Court in the case,) was reversed in the case of Pinckney vs. Lanahan, 62 Md. 453, but so far as the judgment in Larrabee vs. Talbott sustained the preference given to the foreign creditors of the insolvents, it remained as the law of Maryland until the decision in this case.

It is respectfully submitted that the judgment of the Court of Appeals should be reversed, so far as it undertakes to annul the deed of trust.

CHARLES MARSHALL,
For Plaintiff in Error.

JAN 4 1892

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

EVA BROWN, EXECUTRIX OF SOLOMON BROWN,
PLAINTIFF IN ERROR,

vs.

THEODORE B. SMART AND OTHERS,
DEFENDANTS IN ERROR.

Writ of Error to the Court of Appeals of Maryland.

BRIEF FOR DEFENDANTS IN ERROR.

M. R. WALTER,
CHARLES A. BOSTON,
For Defendants in Error.

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STATEMENT.

By sections 13, 23 and 24 of chapter 172, of the Laws of Maryland of 1880, it was provided as follows:

Section 13. "No deed or conveyance executed, or lien created, by any banker, broker, merchant, manufacturer or trader being insolvent or in contemplation of insolvency, shall be lawful or valid if the same shall contain any preferences, save such as result from operation of law and save those for the payment of the wages or salaries to clerks, servants and employees contracted not more than three months anterior to the execution thereof; and

all preferences, with the exceptions aforesaid, shall be void, however the same may be made; provided, the grantor or party creating said lien or preferences shall be proceeded against under section 23 or apply for the benefit of this Act under section 1 of said Act, within sixty days after the recording of the deed or conveyance, or the creation of said lien or preference, and shall be declared, or shall become under the provisions of this Act an insolvent." (This section was amended by chapter 295, Acts of 1884, by striking out "broker" and inserting "stock broker," and by chapter 298 of the Acts of 1886, by striking out "sixty days" and inserting "four months.")

Sec. 23. "Any person who shall depart from or remain absent from this State with intent to hinder, delay or defraud his creditors, or conceal himself to avoid service upon him in any action for the recovery of a debt, and any person who conceals or removes any of his property to prevent the same from being taken under legal process, or makes an assignment, gift, sale, conveyance or transfer of all or part of his estate or property, with the intent to delay, hinder or defraud his creditors, or belonging to any of the classes mentioned in section 14 of this article, when insolvent or in contemplation of insolvency, executes a deed or conveyance giving preferences, creates a lien making any unlawful preferences as therein stated, or otherwise gives such preferences, or belonging to said last-mentioned classes, when insolvent or in contemplation of insolvency, confesses any judgment or allows any judgment to be entered against him by any connivance, or belonging to any of said classes, when insolvent or in contemplation of insolvency, fraudulently stops payment or suspends payment of his negotiable paper and fails to resume payment thereof within twenty days, or being a banker or broker, shall fail for twenty days to pay any depositor on demand lawfully made, shall be deemed to have committed an act or acts of insolvency, as the case may be; provided, the petition mentioned in the succeeding

section is filed within sixty days after the act of insolvency is committed." (This section was amended by Act of 1886, chapter 298, by striking out sixty days and inserting four months.)

Sec. 24. "A petition may be filed in any of said Courts having the right to take jurisdiction of the debtor so committing any act of insolvency in the preceding section mentioned, by any one or more creditors, the aggregate of whose debts against the insolvent amounts to at least the sum of two hundred and fifty dollars, at any time within four months after the recording of any of the conveyances, creation of liens, or committing of any of the acts of insolvency in this article specified." * * * "If the allegations be sustained and are sufficient to warrant the same, an adjudication shall be made by the Court that the debtor is insolvent, and thereupon, and by virtue of the adjudication, his right and power to dispose of any part of his estate and property shall cease; and when the Court shall have appointed a preliminary trustee, all such estate and property shall, as soon as the bond of said trustee shall have been approved, be divested out of the insolvent and vested in the trustee." * * *

[These three sections constituted part of Article 48, title, "Insolvents," of the Code of Public General Laws of Maryland, in force in 1887, and constitute part of Article 47, title, "Insolvents," of the present Code of 1888.]

In this state of the law of Maryland, on the 30th day of November, 1887, Solomon Brown, a resident of, and a merchant and trader carrying on business in, the city of Baltimore, executed to Isaac Eichberg a deed of trust of his property, which was all situated in said city. (Record, page 2.)

The deed, (which was executed in Baltimore city and recorded among its land and chattel records,) after reciting that said Solomon Brown was "*indebted to sundry persons to an amount exceeding his present means to pay his creditors*

in full," conveyed the said property to the said Eichberg, in trust to reduce the same to money and, after paying all proper charges, to apply the net residue to the payment of certain named creditors, all of whom were non-residents of the State of Maryland, the deed further reciting that all of said obligations were for money loaned to said Brown by the several creditors named, who were "*preferred by said Brown* in consideration of their agreement to accept the provisions hereby made for the payment of their said several debts in full satisfaction of their claims against said Brown and to acquit and discharge him from any part of said several debts hereby secured which remain unsatisfied by the proceeds of the property hereby conveyed in trust." After the payment in full of all said non-resident creditors the residue was directed to be applied to the payment of all other creditors of the said Brown.

On December 8th, 1887, the defendants in error filed in the Court of Common Pleas of Baltimore city a petition (Record, page 1,) setting forth the above-named facts and an indebtedness to them by said Brown of $608.59. That while so indebted to the petitioners, and being insolvent or in contemplation of insolvency, he had executed, acknowledged and delivered the aforesaid deed of trust making the aforesaid preferences, which were charged to be in direct contravention of the provisions of Article 48 of the Code of Public General Laws of the State of Maryland and the several amendments thereto; concluding with a prayer for subpœna, the adjudication of said Brown as an insolvent, the vacating of said deed, and the appointment of a trustee, etc.

To this petition Solomon Brown, on December 28, 1887, filed a demurrer (Record, page 5,) which was on the 21st day of March, 1888, overruled. He then (Record, page 5) filed an answer admitting the petitioners were creditors and that he was a merchant and trader, as set forth in said petition. He also admitted the execution of the deed, but denied that it contained any illegal or forbidden prefer-

ences because he claimed that the persons named as preferred creditors in said deed of trust all resided out of the State of Maryland and were creditors upon contracts made and to be performed out of the State of Maryland, and that each and every one of the said creditors named in said deed of trust agreed with him *at the time of the execution of the said deed of trust*, to accept the provisions of said deed in full satisfaction of their respective claims against him, and in consideration of said deed and the provisions therein contained did release him from all further obligation. The answer further claimed that the Court of Common Pleas had no jurisdiction to decide upon the validity of said deed of trust, and specially denied that such adjudication could be made in any Court which has not acquired jurisdiction of the persons named in said deed of trust, either directly or by representation through the trustee, and averred that neither the trustee nor any of the creditors secured by said deed had been served with process or otherwise been made parties to this proceeding.

The case was argued, and the several defenses taken in the answer were overruled; Brown *was adjudicated an insolvent*, and the deed of trust declared void. (Record, page 6.) From the order overruling his demurrer, and from the order adjudicating him an insolvent and declaring void the deed of trust, Solomon Brown appealed to the Court of Appeals of Maryland, which Court affirmed the decision of the lower Court, the opinion of the Court appearing on pages 7 to 13 of the Record.

From this decision of the Court of Appeals of Maryland, Brown sued out a writ of error, because, as he claimed, there had "been drawn in question the validity of a statute of, and an authority exercised under, the State of Maryland, on the ground of their being repugnant to the Constitution of the United States, and the decision of said Court of Appeals being in favor of such their validity, and there having been drawn in question therein the con-

struction of a clause of the Constitution of the United States, and the decision of the said Court of Appeals being against the title and right specially set up and claimed under said clause of the said Constitution."

ARGUMENT.

I.

1. "This being a writ of error to the highest Court of a State, a federal question must have been decided by that Court against the plaintiff in error; else this Court has no jurisdiction to review the judgment." Although "it is sufficient if it appears by clear and necessary intendment that *the question must have been raised, and must have been decided* in order to have induced the judgment," yet "it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, *in the Record*, that it did arise, and was applied by the State Court to the case."

N. O. Water Works vs. La. Sugar Co., 125 U. S. 29.

2. It was claimed by the plaintiff in error in the State Courts, that the deed of assignment having been made and accepted on the basis of a contract for the release and satisfaction of pre-existing debts, it constituted a contract with the preferred non-resident creditors, which could not be affected by the State Insolvent Law, as the obligation of the contract would have been thereby impaired in violation of section 10 of article I of the Constitution of the United States. But that contention has been abandoned by the plaintiff in error in this Court, it being now conceded "that a law made before a contract is made, cannot be said to be a law that impairs its obligation within the meaning of article I, section 10, of the Constitution," as has been repeatedly held by this Court.

Edwards vs. Kearzey, 2 How. 612, 613, 614.
Kennedy vs. State Bank, 8 How. 613.
Denny vs. Bennett, 128 U. S., 494.
Cole vs. Cunningham, 133 U. S., 114.

3. The only error now assigned by the plaintiff in error in the judgment of the Court of Appeals of Maryland is that the insolvent law of Maryland, as expounded by the judgment of that Court, deprives the plaintiff in error of a right without due process of law, and is therefore in conflict with the first section of the fourteenth amendment of the Constitution of the United States, which forbids any *State* from passing any such law.

That prohibition is aimed at the legislative power of the State, and not at the decisions of the Courts.

N. O. Water Works vs. La. Sugar Co., 125 U. S., 30.

4. Now the constitutionality of the insolvent law of Maryland, so far as the fourteenth amendment was concerned, was not only not passed upon by the Court of Appeals of Maryland, but there is nothing in the Record to show that it was either suggested, raised or considered. It is true that the answer of the plaintiff in error claimed that an adjudication upon the validity and effect of the deed of trust could not be made in any Court which had not acquired jurisdiction over the persons named in the deed, either directly or by representations through the trustee; and the Court of Appeals in passing upon this question held that the Court of Common Pleas had unquestionable jurisdiction over Solomon Brown, and had duly adjudicated him an insolvent debtor; that this adjudication declared the status of Brown and was a judgment *in rem* or in the nature of a judgment *in rem*, and as such was conclusive upon all persons, whether parties or not; that, such being the nature of the judgment, the deed of trust in this case—the insolvency and preferences being apparent on its face—was necessarily *ipso facto et constructione legis* void without any express declaration of the Court apart from the adjudication of the debtor as an insolvent. In other words, that the simple adjudication of Brown as an insolvent debtor made the deed void.

There was certainly no suggestion in the plaintiff in error's contention, nor in the Court's decision thereon, of the constitutionality or unconstitutionality of the insolvent law of Maryland, as respects the fourteenth amendment.

5. The Court of Appeals did not decide, nor was it necessary for it to decide, that the deed was declared void by virtue of any power conferred upon it by the insolvent law.

Now the rule is well settled that when it appears by the Record that the judgment of the State Court might have been based either upon a law which would raise a question of repugnancy to the Constitution of the United States, or upon some other independent ground; and it appears that the Court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this Court will not take jurisdiction of the case, even though it might think the position of the State Court an incorrect one. To give this Court jurisdiction of a writ of error to a State Court it must appear affirmatively, not only that a federal question was presented for decision to the highest Court of the State having jurisdiction, but that "its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it."

N. O. Waterworks vs. La. Sugar Co., 125 U. S. 30.

6. But even had the Court of Appeals expressly decided that there was nothing in the Insolvent Law in conflict with Section 1 of the 14th Amendment, would this Court not be compelled to sustain it in that position?

What provision is there in the Act that undertakes to take away anyone's rights or property without due process of law? Section 13 of the Act of 1880 declares that deeds containing preferences executed by insolvent debtors

shall be void if the debtor shall be declared or shall become, under the provisions of the Act, an insolvent. But there is nothing in the Act directing any form of proceeding for vacating such deed. The Act does not say how, when or by what tribunal the deed is to be declared void. That is left by the Insolvent Law to be accomplished by the Courts according to their usual course in such cases.

The plaintiff in error refers to Section 24 [25] of the Insolvent Law, which provides that when a deed is made by any person, belonging to any of the classes mentioned in Section 14 [13,] when insolvent or in contemplation of insolvency, "the same shall be *prima facie* intended to hinder, delay and defraud the creditors of the person by whom the same is made, and the burden of proof shall rest upon him and the grantee to explain the same and show the *bona fides* thereof;" and proceeds to say that: "This section evidently contemplates that the grantee shall have an opportunity to be heard in defense of his rights, and yet the law contains no provision for notice to him of any kind," &c. Section 24 is nothing more than a rule of evidence, and in a proper proceeding taken there will be by virtue of that section that presumption against the grantee. Assuming that it contemplates that the grantee is to have an opportunity to be heard, the law does not direct any form of procedure and naturally does not undertake to direct what notice is to be given. It would be very extraordinary for the law to provide for notice to be given to the grantee when it is utterly silent as to what proceedings are to be taken to have the deed vacated.

The only provisions of the law that regulate procedure at all are those in reference to the proceedings to have the defendant adjudicated an insolvent, and these expressly provide for notice and a hearing for him.

7. But the non-resident creditors and the trustee are not here complaining, and what standing, therefore, has the plaintiff in error in this Court? Solomon Brown was a

resident of Maryland, was duly summoned as provided by law, appeared, made his defense and was duly adjudicated an insolvent. The Court had the unquestionable right, so far as he was concerned, to declare him an insolvent and to vacate the deed. Whether the non-resident preferred creditors were or were not summoned, and whether the Court of Appeals of Maryland undertook to affect their rights without their being properly before it or not, are questions with which the plaintiff in error has nothing to do. He is bound by the decision whether they are or not.

8. If the adjudication of Solomon Brown as an insolvent debtor "is a judgment *in rem*, or in the nature of a judgment *in rem*, and as such is conclusive and binds all persons, whether parties or otherwise, as to the particular point or matter decided" (opinion of Mr. Ch. J. Alvey, Record, page 12,) that is an end of the whole matter. If not, the non-residents are not bound and cannot be affected by the decree vacating the deed and can assert their rights in a cause to which they are parties as if no such decree had been passed.

II.

If the decision of the Court of Appeals of Maryland upon the merits should, for any reason, be considered before this Court, we respectfully claim that it would have to be affirmed.

1. The real question in the case was: Could the non-resident creditors of Brown claim the preferences under the assignment in question, executed, acknowledged and recorded in Maryland, which the laws of that State declare void? In other words, is the validity of an assignment for the benefit of creditors, of property in Maryland, executed, acknowledged and recorded therein, to be determined by the then existing laws of that State, or not?

"It is," as Mr. Chief Judge Alvey says, in his opinion on page 11 of the Record, "certainly a well-settled principle that in cases like the present, the *lex loci rei sitae* must

alone furnish the rule for determining the validity of the assignment and the preferences thereby created, and though the instrument may be ~~void~~ valid according to the principles of the Common Law, it can hardly be contended that its validity can be maintained in defiance of the express terms of a statute declaring it absolutely void. Whar. Conf. Laws, Secs. 297, 312, 802. The deed of assignment was made and accepted with reference to the terms of the statute quoted, and with the implied condition annexed that, if the assignor was proceeded against in insolvency within four months, and declared an insolvent, the deed would fail as a necessary legal consequence. This results from the general principle, well established, that the laws which subsist at the time and place of making the contract enter into and form a part of it, as if they were expressly referred to and incorporated in its terms, and this rule embraces alike those which affect its validity, construction, discharge and enforcement. Ogden vs. Saunders, 12 Wheaton, 353; Von Hoffman vs. City of Quincy, 4 Wall. 535; Edwards vs. Kearzey, 96 U. S. 595, 601."

The laws in existence in the place of contract, when made, form a part of the contract and are the measure of the obligation on the one side and the right on the other.

McCracken vs. Howard, 2 How. 612.
B. & O. R. R. vs. Glenn, 28 Md. 287, 321.
Crapo vs. Kelly, 16 Wall. 630.

The proposition ought to be too clear to require discussion, that, when a deed voidable under the laws of the State where executed and recorded is subsequently set aside in accordance with those laws, no one can lawfully complain. It would certainly be an anomaly if a person having no rights except under a conveyance conditionally void by the laws of the State where executed and recorded, could claim that the enforcement of the condition violated his rights.

2. A State has jurisdiction over all property, whether movable or immovable, within her territory, whether belonging to residents or non-residents, and has a right to regulate the transfer thereof, and how and in what manner it shall be subject to the claims of creditors in its own way and by its own laws, provided the obligations of contracts are not thereby impaired.

Denndy vs. Bennett, 128 U. S., 498.
Geilinger vs. Phillippi, 133 U. S., 257.
Green vs. Van Buskirk, 7 Wal., 150.
Crapo vs. Kelly, 16 Wal., 630.
Kennedy vs. Georgia State Bank, 8 How., 613.
Sloane vs. Chiniquy, 22 Fed. Rep., 213.
Whar. Conf. Laws, sections 311, 337, 386.
Story Conf. Laws, sections 390, 410.
Conrad vs. Dillinger, 56 Md., 60, 61.

A sovereign has authority over personal property actually within his jurisdiction, and the obligation of a sovereign to enforce his own laws and protect his own subjects is paramount. "It would be," to use the language of this Court, "an absurdity to affirm the contrary."

Smith vs. Union Bank, 5 Peters, 518, 526.

In Pinckney vs. Lanahan, 62 Md., 447, the jurisdiction of the Insolvent Courts of that State over property within its territory was sustained as against non-residents.

See also Yonley vs. Lavender, 21 Wal., 282, in which the jurisdiction of the local Insolvent Courts is assimilated to that of local Probate Courts over the estates of deceased persons.

3. Section 13 of the Acts of Assembly of Maryland above set out, is nothing more than any other of the laws of Maryland regulating conveyances, and is binding on residents and non-residents alike.

Knower vs. Haines, 34 Fed. Rep., 514, 517.
Witters vs. Sowles, 33 Fed. Rep., 758.

In Knower vs. Haines, Knower, a resident of New York, instituted a suit to foreclose a mortgage of $50,000, executed by a resident of Vermont on property situate in Bennington, Vermont. The assignee in insolvency of the mortgagor claimed that the mortgage was void as against him under the insolvency laws of Vermont. The Court says: "The laws of Vermont provide that if a person being insolvent or in contemplation of insolvency, within four months of insolvency makes such conveyance to a creditor, having reasonable cause to believe him insolvent, or in contemplation of insolvency, and that such conveyance is made in fraud of the laws relating to insolvency, the same shall be void. Rev. Laws Vt., 1860. There is no fair question but that Haines was actually insolvent at the time of making this mortgage, nor but that he was so far insolvent that he knew the mortgage, if operative, would work a preference to the orator. And the proof shows that the orator had good grounds, amounting to reasonable cause, to more than suspect, and to believe, that he was insolvent, and that the mortgage, if operative, would withdraw his property from the reach of his other creditors, and prevent its equal distribution, under any law, among them."

"The point is made in the pleadings that this law of Vermont is contrary to that provision of the Constitution of the United States which prohibits any State from making any law impairing the obligation of any contract. It regulates conveyances, which it does not seem doubtful that any State may do as to any property within its jurisdiction, notwithstanding this clause in the Constitution of the United States."

"Let there be a decree that this mortgage is void as to the defendant Carney, as assignee of Haines, and that the bill be dismissed as to him, with costs."

In the case of Witters, Receiver, vs. Sowles, a bill was filed by the receiver of the First National Bank of St. Albans against the assignee in insolvency of Sowles to

foreclose three mortgages from Sowles to the bank to secure $60,000. The assignees defended on the ground that the mortgage was void as to them, and filed cross-bill to have them set aside. The Court says: "The laws of the State provide that a person owing debts to an amount exceeding $300, who, among other things, makes a conveyance of his property with intent to give preference to one or more of his creditors; and the creditors may, within ninety days thereafter, apply to the Judge of the Court of Insolvency, setting forth the facts, who, on ten days' notice to the debtor, may make an adjudication of insolvency of the debtor. (Rev. Laws Vt. 1870.) They also provide that if a person being insolvent or in contemplation of insolvency, within four months before the filing of the petition, with a view to give preference to a creditor, makes a conveyance of his property to a person having reasonable cause to believe the debtor insolvent, or in contemplation of insolvency, and that the conveyance is made in fraud of the laws relating to insolvency, the same shall be void. (Section 1860.) * * * The question is one of title to the mortgaged property, between the reciver under the laws of the United States, and the assignees, under the laws of the State, to determine to which estate the property belongs. * * * The title is to be governed by any law applicable to it, and all such laws are to be respected in ascertaining whose it is. The bank took this mortgage with all the limitations the laws of the State imposed upon it, the same as any individual would. The statute is a regulation of conveyances which binds the title as to all persons claiming under them. Knower vs. Haines, 31 Fed. Rep., 513. A creditor to the requisite amount, under the insolvency law of the State, has the right, unquestionably, to prefer his petition, and put all conveyances within four months previous, to the test of the provisions of that law."

See also Witters vs. Sowles, 32 Fed. Rep., 762.

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